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PETER A. MOORE, JR., CLERK
US DISTRICT COURT, EDNC
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:22-CV-168-BO

VICTOR A. MALAFRONTI,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

AMICUS CURIAE BRIEF

Statement of Interest

The undersigned third party respectfully submits this brief as amicus curiae in support of the Court, Federal Rule of Civil Procedure 7.1, Local Rule 7.3, and Local Rule 83.1(e)(5), in relation to the amicus brief of October 18, 2022, submitted by the Bell Legal Group. The undersigned party supports the position taken by the Bell Legal Group in their amicus brief, but based on my unmatched experience and expertise in both the litigation finance industry originating and financing cases, as well as my prior military service while stationed at Camp Lejeune and the first-hand knowledge I have of the impact Camp Lejeune has had on veterans and their families, the undersigned feels compelled to raise significant issues that necessitate disclosure by attorneys seeking to practice under Local Rule 83.1(e)(5) in cases filed pursuant to the Camp Lejeune Justice Act (CLJA) despite any resulting personal financial liability.¹ Specifically, attorneys representing plaintiffs in CLJA cases before this court should be required to disclose information regarding their third-party litigation funders in a manner similar to the procedures set forth in Local Rule 7.3.

Clients and the Court should be made aware of who is financing CLJA litigation, and clients should be allowed to make an informed choice as to whether they want

¹ The undersigned party is prepared to provide additional information and documents as the Court deems necessary to further illuminate the compelling necessity to address this issue. The undersigned party, in the interest of protecting confidential information, has chosen not to include it in this brief but will comply with any order by the Court to provide additional information for an *in camera* review.

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1 to proceed knowing who else their attorney may have an obligation to. Third-party
2 litigation funding creates the potential for a conflict of interest for the plaintiff's
3 attorney, as well as an incentive for funders to misrepresent, and a court taking
4 steps to address these issues is not unprecedented. In 2018, the court in the national
5 prescription opiate litigation issued an order disclosing details of any third-party
6 contingent litigation financing.² This brief recommends the Court do the same, but
order disclosures in even greater detail to reflect the gravity of the risks created by
unscrupulous attorneys and predatory funders from profiting at the expense of
taxpayers by taking advantage of veterans.

7 **Background**

8 The Bell Legal Group brief of October 19, 2022, provides an exceptional overview
9 of the legislative history behind the CLJA, and the undersigned adopts their
10 summary of facts for purposes of this brief. What was not covered in their brief,
11 however, is in an important aspect of the coming litigation under CLJA. The
12 commercial interests of mass tort law firms, hedge funds, broker-dealers, and other
third-party litigation funders create a substantial probability of a conflict of interest
between an attorney's professional duties to her client and the commercial interests
of the third parties funding that attorney's representation of her client.

13 To be clear, this brief is not meant to be an indictment of the litigation finance
14 industry as a whole. Given the increasing complexity of products liability and
15 other mass tort cases, third party litigation funding is quickly becoming the only
16 way hundreds of thousands of Americans can have any hope of seeking justice
17 when they are harmed. In many ways, litigation finance has levelled the playing
field for plaintiffs. However, the lack of oversight and transparency in litigation
finance has also created opportunities for fraud and created financial incentives
that are not always aligned with the best interests of the plaintiffs.

18 *Litigation Finance, an Overview*

19 Traditionally, litigation finance has been a credit strategy available only to
20 institutions and extremely wealthy, high net worth individuals. Lawsuits are an
21 attractive asset class because they offer "a non-correlated, alternative investment
class that offers the prospect of double-digit returns ... when other asset classes are
underperforming."³ Third-party litigation funders, who are often but not always

22 ² Order Regarding Third-Party Contingent Litigation Financing, *In Re: National Prescription Opiate Litigation*,
Case No. 1:17-MD-2804(N.D. Ohio, May 7, 2018)

23 ³ <https://thehedgefundjournal.com/the-emerging-market-for-litigation-funding/>

1 hedge funds, “satisfy a niche in the market for legal representation, where neither
2 the client nor its lawyers wish to (or are able to) bear the up-front costs and risks of
3 financing a lawsuit.”⁴ Other entities, such as Stifel, are involved in “originating,
4 syndicating, trading and brokering litigation-focused investments,” and “act as the
5 secondary market maker for the litigation funding industry.”⁵ In essence, litigation
6 finance has created a cottage industry within the financial sector that has matured
7 into a ubiquitous feature of mass torts and other high stakes civil litigation.

8 Third-party litigation funding, while often necessary to guarantee a plaintiffs
9 access to the courts, is an extremely lucrative industry that has made many lawyers
10 and financiers a staggering amount of wealth. As is evident from the explosive
11 growth of divisions within entities like Stifel who specialize in lawsuit-based
12 investments, litigation funding clearly creates financial interests by third-party
13 non-litigants in the outcome of litigation. Lawyers involved in that litigation owe
14 substantial sums of money to those third-party non-litigants. This creates the
15 potential for conflicts between an attorney’s ethical duties to clients and fiduciary
16 duties to investors. At a minimum, these potential conflicts require disclosure and
17 consent; however, no such requirement presently exists. Litigation finance
18 currently does not merit the level of transparency other, more traditional asset
19 classes do, though this is changing.

20 *Push for Greater Transparency*

21 Recently, the SEC released proposed rules for public comment that would, among
22 others, require greater transparency in litigation finance.⁶ Specifically, the SEC
23 noted that the current disclosure forms hedge funds and other investment advisors
24 are required to submit does not provide sufficient data for the SEC to properly
25 assess the risk litigation finance may pose to investors. Trade groups such as the
26 U.S. Chamber of Commerce are calling for even greater transparency as the market
27 for litigation finance is valued in the tens of billions of dollars,⁷ continues to grow
28 and the threat posed by foreign entities funding litigation as a means of attacking
29 the U.S. industrial base begins to emerge.⁸

30 ⁴ Id.

31 ⁵ <https://stifelinstitutional.com/capabilities/fixed-income-capital-markets/>

32 ⁶ <https://www.sec.gov/rules/proposed/2022/ia-6083.pdf>

33 ⁷ <https://news.bloomberglaw.com/securities-law/hedge-fund-lawsuit-financing-poised-for-sec-enforcement-scrutiny>

34 ⁸ Id.

1 The U.S. House of Representatives has pending legislation that directly addresses
2 the lack of transparency in litigation finance. Specifically, the House is
3 considering a bill that would require law firms to

4 [D]isclose in writing to the court and all other parties the identity of any
5 commercial enterprise, other than the named parties or counsel, who has a
6 right to receive payment that is contingent on the receipt of monetary relief
7 in the civil action by settlement, judgment, or otherwise.⁹

8 Additionally, U.S. Senators, notably U.S. Senator Dan Sullivan of Alaska (himself
9 a former Marine) have advanced legislation to address what they perceive to be
10 predatory practices and fraud aimed at potential plaintiffs under the CLJA. At
11 least six other U.S. Senators joined Senator Sullivan in his proposal. This is in part
12 driven by the enormous financial windfall attorneys and third-party litigation
13 funders expect to receive from litigation under the CLJA. American Law Firm
14 Capital principal Jeff Huff recently projected that financing litigation under the
15 CLJA would yield a five to ten times return on investment. This is an
16 extraordinary financial interest, one that dwarfs the interest of a Marine veteran
17 who lives below the poverty line because of injuries from toxic exposure when that
18 Marine served on Camp Lejeune.

19 *An Incentive for Fraud*

20 The lack of transparency and oversight in litigation finance highlighted by these
21 public policy initiatives has hampered the SEC's examination and enforcement
22 program and created opportunities for fraud and other wrongdoing. The lack of
23 transparency has, among other things, permitted certain individuals who have
24 disqualifying events under SEC Rule 506¹⁰ and similar regulations, to openly
25 participate in the business. For example, an individual named Howard Berger
26 became involved in litigation with a firm for allegedly using, without their consent
27 or knowledge, the firm's docket as collateral to secure funding for other law
28 firms.¹¹ Mr. Berger has a lifetime ban from FINRA and was enjoined by the SEC
29 in 2013.¹² SEC Rule 506 bars individuals with these disqualifying events from
30 participating in transactions necessary for funding litigation. As is evident from
31 the recent lawsuit, Mr. Berger simply substituted his previous securities fraud
32 schemes with new litigation finance transactions.

33 ⁹ <https://www.congress.gov/bill/117th-congress/house-bill/2025/text>

34 ¹⁰ See 17 CFR § 230.506 - Exemption for limited offers and sales without regard to dollar amount of offering.

35 ¹¹ Defendants' Answer and Counterclaims, *Legal Recovery Associates LLC v Brenes Law Group, PC and Troy A. Brenes*, Case No. 22 CV 1778 (So. Dist. N.Y., Mar. 3, 2022).

36 ¹² <https://www.sec.gov/litigation/litreleases/2013/lr22616.htm>

1 In another example, an entity known as Mass Tort Nexus has a long-standing
2 relationship with a number of prominent mass tort law firms. Mass Tort Nexus
3 provides services that include docket valuation and helps law firms secure funding.
4 Mass Tort Nexus is run by an individual named John Ray, who was formerly
5 known as John Spicer, and was convicted of armed robbery and aggravated assault
6 in Georgia in 1981.¹³ Mr. Ray does not hold any securities licenses, is not a
7 certified public accountant, nor does he have any extensive experience in the
8 finance sector. Nevertheless, video testimonials from dozens of mass tort lawyers
9 and firms, including Jeff Huff who projects five to ten times return on investment
10 for CLJA cases, are publicly available and demonstrate the scope of Mass Tort
11 Nexus' involvement in originating and financing cases.¹⁴

8 The involvement of Bad Actors in litigation finance is no secret within the
9 industry. Attorneys are aware of these individuals' backgrounds yet persist in
10 involving them in financing transactions. For example, attorney J. Ross Wallin,
11 who runs the hedge fund Curiam Capital and frequently finances law firm dockets,
12 admitted in a response to my New York bar complaint against him that Mr. Wallin
13 became aware of John Ray's criminal background and still chose to continue to
14 involve him in financing transaction. Mr. Wallin also admitted in his response to
15 my bar complaint that he was aware of Howard Berger's lifetime ban and SEC
16 injunction yet continued to involve Mr. Berger in financing transactions. Mr.
17 Wallin's firm, Curiam Capital, is featured prominently in the recent lawsuit
18 alleging fraud by Mr. Berger and Legal Recovery Associates.¹⁵

15 Third-party litigation funding incentivizes fraud in other aspects of mass tort
16 litigation. Case origination, for example, is an area ripe for fraud. For example, in
17 2013 BP accused plaintiff's lawyers of filing claims for 40,000 nonexistent
18 plaintiffs.¹⁶ Mikal Watts was later prosecuted by the federal government for
19 allegedly filing claims for the 40,000 non-existent plaintiffs. Given the financial
20 windfalls American Law Firm Capital and others predict from CLJA litigation, the
21 incentive for fraud is extremely high and case origination should be heavily
22 scrutinized as well. Every dollar paid to unscrupulous attorneys for false claims is

21 ¹³ The undersigned learned of this information with the assistance of Brad Greer, the former Lawyer / General
22 Counsel and Vice President of Government Affairs of Lifelock, as part of the due diligence process in a potential
23 transaction. <https://www.linkedin.com/in/brad-greer-995b574/details/experience/>

24 ¹⁴ https://www.youtube.com/shorts/fBSLzJ_4YnQ

¹⁵ Defendants' Answer and Counterclaims, *Legal Recovery Associates LLC v Brenes Law Group, PC and Troy A. Brenes*, Case No. 22 CV 1778 (So. Dist. N.Y., Mar. 3, 2022).

¹⁶ <https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bp-files-suit-plaintiff-lawyer-fraud.html>

1 a dollar that is ripped from the pockets of the American Patriots who volunteered
2 to put their lives at risk for our national security.

3 The involvement of SEC Bad Actors and unscrupulous attorneys can have
4 detrimental effects to clients. In the American Medical Systems transvaginal mesh
5 Multi-District Litigation, for example, convicted felon Vincent Chhabra was
6 involved in case origination and case financing for the firm McSweeney /
7 Langevin. When the court learned of Mr. Chhabra's involvement, hundreds of
8 cases that had already been resolved were remanded for new trials, and the
9 plaintiffs in those cases suffered diminished awards. In the same case, individuals
involved in case origination convinced potential plaintiffs to undergo unnecessary
surgery to increase the value of their damages.¹⁷ These documented incidents
demonstrate the potential for substantial fraud in case origination and motives for
plaintiffs to misrepresent, something that is relevant at trial and therefore
something the US Justice Department is entitled to seek in discovery.¹⁸

10 The lack of transparency over third party litigation funders also permits individuals
11 with little or no finance knowledge or experience to perform valuations in
12 financing transactions. This lack of experience or credentials creates conditions
13 for fraud because you have individuals providing valuations without well
14 established, vetted methodology that is standard and expected in the rest of the
15 finance sector. John Ray, for example, is not a certified public accountant and has
16 no experience in the finance sector, yet routinely performs docket valuations for
firms. Yet law firms rely on him frequently to value their underlying assets,
potential awards for plaintiffs, which they then use to justify loans at favorable
terms than they would otherwise not be entitled to.

17 As it currently stands, the SEC does not have visibility over entities like Mass Tort
18 Nexus, Stifel, and American Law Firm Capital when they are engaged in financing
litigation and therefore are often unaware if the transactions involve Bad Actors.

19 ¹⁷ See Complaint, *Plummer v. McSweeney, et al.*, Case no. 4:18-cv-00063 (E.D. Ark., Jan 24, 2018) (alleging "a
20 deep running conspiracy to turn a potential defective medical product into a cash cow for a wide range of people
including lawyers, doctors, and investors, but not for the women who had the potentially defective medical product
installed in their bodies.")

21 ¹⁸ See *United States v. Abel*, 469 U.S. 45 (1984) (impeachment for bias governed by Rule 403 principles); *United*
22 *States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules
402 and 403, not Rule 608(b)); see, e.g., *Charter v. Chleborad*, 551 F.2d 246, 248 (8th Cir.1977) (fact that
23 defendant's insurer employed witness "was clearly admissible to show possible bias of that witness"); *Yazdani v.*
BMW of N. Am., LLC, 188 F. Supp. 3d 486, 495 (E.D. Pa. 2016) (admitting the plaintiffs' agreement with an insurer
under FRE 411 to establish bias where the plaintiffs had named the insurer's employees as witnesses in the case).

1 These are the gaps that policymakers are seeking to close, but the existing rules do
2 not provide the required disclosures necessary to mitigate the potential conflicts, or
3 worse, fraud.

4 **The Rules**

5 The Supreme Court has long recognized the danger that financing a lawyer to
6 render legal services will “dilute his loyalty to his client.” *Polk County v. Dodson*,
7 454 U.S. 312, 327 (1981).

8 The Federal Rules of Civil Procedure require financial disclosures in very limited
9 circumstances. Fed. R. Civ. P. 7.1 only requires a nongovernmental corporate party
10 to provide a disclosure statement that: “(1) identifies any parent corporation and
11 any publicly held corporation owning 10% or more of its stock; or (2) states that
12 there is no such corporation.”

13 Local Rule 7.3 increases the scope of Fed. R. Civ. P. 7.1 by requiring all parties to
14 a civil case, whether they are covered by the federal rule or not, to provide the
15 same information required by the federal rule, as well as:

16 (1) A trade association shall identify in the disclosure statement all members
17 of the association, their parent corporations, and any publicly held
18 companies that own ten percent or more of a member’s stock;

19 (2) All parties shall identify any publicly held corporation, whether or not a
20 party to the present litigation, that has a direct financial interest in the
21 outcome of this litigation by reason of a franchise, lease, other profit-sharing
22 agreement, insurance, or indemnity agreement;

23 (3) Whenever required by Fed. R. Civ. P. 7.1 or this rule to disclose
information about a corporation that has issued shares to the public, a party
shall also disclose information about similarly situated master limited
partnerships, real estate investment trusts, or other legal entities whose
shares are publicly held or traded.

None of these rules, however, requires plaintiffs’ attorneys to disclose their third-
party litigation funders, the terms under which the litigation is being funded, and
the third-party funders’ financial interest in the outcome of the case, namely
because many of the institutions funding litigation are closely held business
entities. The rules, as they currently exist, do not require attorneys to disclose to
the court or clients any third parties financing the litigation, the contracts between

1 the lawyers and those third parties, or require any “know your customer” or “anti-
2 money laundering” procedures to ensure there is no fraud in the financing that
3 could have a detrimental effect on the client’s case and potential award. The Court
4 may, however, under 28 U.S.C. § 2071 and Fed. R. Civ. P. Rule 83, amend the
5 local rules to require such disclosures. Further, the Court may, in its power to craft
6 appropriate remedies, require disclosures of this kind in the individual cases before
7 it.

8 The court in *In Re National Prescription Opiate Litigation* did as much by ordering
9 “any attorney in any MDL Case that has obtained 3PCL financing” to, among
10 other things,

11 [S]ubmit to the Court ex parte, for in camera review, the following: (A) a
12 letter identifying and briefly describing the 3PCL financing; and (B) two
13 sworn affirmations – one from counsel and one from the lender – that the
14 3PCL financing does not: (1) create any conflict of interest for counsel, (2)
15 undermine counsel’s obligation of vigorous advocacy, (3) affect counsel’s
16 independent professional judgment, (4) give to the lender any control over
17 litigation strategy or settlement decisions, or (5) affect party control of
18 settlement.¹⁹

19 The court ordered these disclosures despite case law categorizing third-party
20 contingent litigation financing documents as work product. Such an order was
21 within the power of the court in the Northern District of Ohio, and is well within
22 the Court’s power here.

23 Argument

24 Only through disclosure can plaintiffs make informed decisions as to whether their
25 attorneys are free from conflicts of interest, in particular financial conflicts of
26 interest that may influence an attorney to make decisions in the best interest of the
27 third-party litigation funders and not in the best interests of the clients. Requiring
28 disclosure of this kind was already ordered in the Northern District of Ohio in
29 2018. However, given the continued growth of litigation finance and the financial
30 projections attorneys and financiers have made with upcoming CLJA cases, greater
31 disclosure is required to mitigate the risks of conflicts and fraud. At a minimum,

32 ¹⁹ Order Regarding Third-Party Contingent Litigation Financing, *In Re: National Prescription Opiate Litigation*,
33 Case No. 1:17-MD-2804 (N.D. Ohio, May 7, 2018)

1 the undersigned proposes the Court require attorneys representing plaintiffs under
2 the CLJA to disclose to the Court:

3 (a) the identities of the parties providing funding for the litigation or who
4 otherwise have a financial interest in the outcome of the case;

5 (b) the identities of the parties providing case origination services, broker-
6 dealers who participated in securing funding, parties who performed
7 valuation services for the attorneys' cases, and any other party known to the
8 attorney who was involved in offering securities to finance the litigation; and

9 (c) the terms of the litigation funding and any projected return third-party
10 non-litigants with a financial interest in the outcome of the case expect to
11 receive.²⁰

12 The Court should further require attorneys to provide the contracts, term sheets,
13 and other documents associated with any financing transaction in their case to the
14 Court. Much like the SEC proposes to do with hedge funds, these contracts and
15 term sheets can be provided ex parte and kept under seal to ensure confidentiality.

16 The undersigned further proposes that the court require attorneys representing
17 plaintiffs under the CLJA to affirm in writing to the Court:

18 (a) they have disclosed the same to their clients and advised on the third-
19 party financial interests of the case;

20 (b) their clients consent to further representation after having been so
21 advised;

22 (c) they have conducted due diligence in accordance with SEC and FINRA
23 standards regarding the third-party non-litigants involved in financing the
24 litigation; and

(d) there has been no fraud in obtaining financing for the litigation.

18 This final proposed affirmation is akin to "control person liability" under Section
19 20(a) of the Securities Exchange Act. Section 20(a) makes executives and board
20 members who facilitate or turn a blind eye to corporate wrongdoing liable even if

21 ²⁰ Given the complexity and nuances of this litigation, the Court should consider the appointment of a "Special
22 Master for Veteran Rights," with unmatched experience and expertise in the business of law that is free from
23 conflicts of interest with existing litigants and funders. This Special Master can review law firm disclosures and
24 advise the Court on the issues raised in this brief. Alternatively, this role can be filled by a member of a leadership
steering committee, can be the committee's direct representative to the Court, can ensure compliance with a
disclosure order, and make periodic reports to the Court that the order is being adhered to.

1 they did not actively participate in it.²¹ While the Court cannot impose the same
2 criminal liability on attorneys that Section 20(a) imposes on executives, existing
3 state bar rules, including those rules requiring candor to the court and the
4 supervisory responsibilities and liability of attorneys over non-attorneys facilitating
5 the delivery of legal services, provide some enforcement mechanism.

6 Litigation funding may have levelled the playing field for small plaintiffs against
7 large, well-resourced defendants, but now the Court must level the playing field for
8 those same small plaintiffs against the wealthiest and best resourced institutions
9 seeking double or triple digit returns off the backs of those small plaintiffs.

10 Disclosure of third-party litigation funding addresses Government concerns about
11 foreign influence and reveals potential material that is relevant to defense counsel
12 for cross-examination. Ultimately, however, disclosure is about protecting clients.
13 They are entitled to choose who represents them in the coming CLJA litigation.
14 They cannot make an informed decision about whether their lawyer will act in their
15 best interest if the third-party litigation funders advancing money to the clients'
16 lawyers remain in the dark. The Court can easily remedy this through amendments
17 to the local rules. Mandating disclosures of the kind detailed above is in line with
18 SEC proposals, and client consent after disclosure is necessary to ensure the word
19 "justice" in the Camp Lejeune Justice Act means anything.

20 Dated: February 24, 2023,

Respectfully submitted,



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21 ²¹ See 15 U.S.C. § 78t(a)

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